Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia
Circuit

PETITION FOR WRIT OF CERTIORARI

Kenneth W. Johnson
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Questions Presented for Review

1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) Johnson sought to enter into a contractual relationship with the defendant(s); 3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and 4) **Johnson was refused or denied the goods or services** that w[ere] otherwise afforded to nonwhite customers:

1) Does Johnson's Amended Complaint fail to state a claim upon which relief may be granted under TITLE 42 U.S.C. § 1981, when Johnson alleged that he was discriminated against in violation of the prohibition of racial discrimination against whites?
2) Does any of the Judgments or Orders of the U.S. Court of Appeals or the U.S. District Court, conflict with a decision of the Supreme Court of the United States in either Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002), or McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 274(1976), or Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, or deny Johnson equal protection of law, when Johnson alleged that he was refused services because he is a white man of mixed racial ancestry?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant is Kenneth W. Johnson.

The Respondent here and Defendants – Appellees are Jesse Gadson, Tony Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

United States Court of Appeals Orders, Opinions or Judgments are located in the Appendix as follows:

October 9, 2007 JUDGMENT w/o Memo.....Apx 1

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United States District Court's Orders, Opinions or Judgments are located in the Appendix as follows:

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JURIDICTION

The dates of the Judgments or Orders sought to be reviewed were entered are October 9, 2007, September 24, 2007 for the U.S. Court of Appeals, and September 19th—20th, 2006, October 23rd, 2006, and November 9th, 2006 for the U.S. District Court. Jurisdiction is conferred to the Supreme Court of the United States by Title 28 U.S.C § 1254. A Petition for Rehearing En Banc is pending in the United States Court of Appeals as of January_____, 2008. This Petition went to the commercial printer for mass production as of January_____, 2008.

THE CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

STATEMENT OF THE CASE

(1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers.

The United States Court of Appeals rejected the initial arguments in Johnson's Appellate Briefs by ruling against them. Johnson's Appellate Briefs advanced the theory: (1) he is a racial minority; (2) he sought to enter into a contractual relationship with the defendant(s); (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the goods or services that w[ere] otherwise afforded to white customers. The United States Court of Appeals for the District of Columbia Circuit ***rejected*** this theory on 10/9/2007 by holding that appellant's complaint failed to state a claim upon which relief may be granted. Presumably, the basis for the Court of Appeals decision on 10/9/2007 is that Johnson is a White man and is not a racial minority. Johnson concurs

that he is a White man and advances the legal theory stated in the first paragraph under the heading "Statement of the Case".

The United States Court of Appeal's 10/9/2007 Judgment completely ignores the fact that Johnson filed a timely Rule 60(b) Motion to Vacate Prior Judgment, which also asked for leave to amend the Amended Complaint pursuant to Rule 15(a) and (c) as well as the Supreme Court precedent in Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222. The United States Court of Appeals reviewed Johnson's 6/9/2006 Amended Complaint ***de novo***.

Johnson did not fail to allege facts in the Amended Complaint that if proven true establish: "(1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/ European or predominately Caucasian/European"; (2) **Johnson sought to enter into a contractual relationship** with the defendant(s); (3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and **Johnson was denied or refused the goods or services."**

The basis for federal question jurisdiction in the court of first instance was that Johnson had been racially discriminated against, and refused goods or services in violation of TITLE 42 U.S.C. § 1981.

ARGUMENT

A. The issue of whether Johnson failed to state a claim upon which relief may be granted

The United States Court of Appeals rejected the initial arguments in Johnson's Appellate Briefs by ruling against them. Johnson's Appellate Briefs advanced the theory: (1) he is a racial minority; (2) he sought to enter into a contractual relationship with the defendant(s); (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the goods or services that w[ere] otherwise afforded to white customers. The United States Court of Appeals for the District of Columbia Circuit ***rejected*** this theory on 10/9/2007 by holding that appellant's complaint failed to state a claim upon which relief may be granted. Presumably, the basis for the Court of Appeals decision on 10/9/2007 is that Johnson is a White man and is not a racial minority.

Johnson's first contentions are these: White males may also sue for racial discrimination as a matter of law. "Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported by the statute's language, which explicitly applies to "all persons," and by its legislative history. While the phrase "as is enjoyed

by white persons" would seem to lend some support to the argument that the statute is limited to the protection of nonwhite persons against racial discrimination, the legislative history is clear that the addition of the phrase to the statute as finally enacted was not intended to eliminate the prohibition of racial discrimination against whites."—*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 274. "[T]here shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other...."— *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 288.

Johnson's second contentions are these: Johnson is not required to plead the [e]ntire 4th element of the prima facie case for racial discrimination in order to survive the defendants' motion to dismiss, as a matter of law: "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion

to dismiss."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002).

It is clear that Johnson did not fail to plead elements 1 through 3 and part of 4 of the prima facie case for racial discrimination in the 6/9/2006 Amended Complaint, which establishes that: 1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/ European or predominately Caucasian/European"; 2) that Johnson sought to enter into a contractual relationship with the defendant(s); 3) that **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers (see the retainer agreements, e-mails, and other documents in the record at [R—181 through 207]); and 4) that **Johnson was refused or denied legal services**. Johnson is not required to plead the phrase: "that w[ere] otherwise afforded to nonwhite customers" in order to survive the defendant's motion to dismiss. See Swierkiewicz v. Sorema, 534 U.S. 506 through 515 (2002). "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511.

"In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in

every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all elements of a prima facie case."—*Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002). It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination ***is discovered***"—*Swierkiewicz* Id. supra at 506.

Simply put, Johnson would not be in the circumstances that he's in now if attorneys had taken the appropriate action a long time ago. The United States Court of Appeal's decisions and the United States District Court's decisions conflict with the decisions of the Supreme Court of the United States in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, at 274. Johnson argues that granting of the "Petition for Writ of Certiorari" is therefore necessary to secure and maintain uniformity of the court's decisions with those of the Supreme Court. Johnson has been variously abused by the attorneys listed in the Amended Complaint: See the 106 page Amended Complaint in the "Record" from the United States Court of Appeals. The Defendants' explanations to Johnson were merely pretext.

Attorney Jesse Gadson, a Black attorney, stated to Kenneth Johnson's face, "You have no civil rights", because of the fact that Johnson is a White man of mixed racial ancestry. He does not

think that Black people have no civil rights; he only thinks that Kenneth W. Johnson has no civil rights, because of the fact that Kenneth W. Johnson is a White man of mixed racial ancestry. Kenneth W. Johnson alleges in the Amended Complaint that Jesse Gadson told him to his face, "***You have no civil rights***". The allegation must be taken as true. See *Swierkiewicz v. Sorema*, 534 U.S. 506. The statement by Jesse Gadson: "***You have no civil rights***" falls in the category ***of discriminatory statements or attitudes*** on the part of the defendant. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc). Jesse Gadson's statement begs the question: What is it about Kenneth W. Johnson that makes Jesse Gadson think that Kenneth W. Johnson has no civil rights [?], which is what Gadson said. Jesse Gadson does not think his Black clients have no civil rights; he thinks that about Kenneth W. Johnson, because Johnson is a White man of mixed racial ancestry. Jesse Gadson refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"It is hereby agreed by and between Kenneth Johnson, (hereafter Client) and JESSE A. GADSON, ATTORNEY AND COUNSELOR AT LAW, (hereafter Attorney), that in consideration of the retainer in the amount of $1,700.00 (non-refundable), said Attorney is hereby retained by the client to provide legal advice and representation, if necessary, regarding the following matter(s): To investigate the incident surrounding the police department role in closing the client business...."

"Specifically Attorney agrees to investigate the possibility of filing a lawsuit against the District of Columbia government."—Record in U.S. Ct. of App. at [R–181].

Tony Lee and McGuireWoods LLP refused Kenneth W. Johnson the legal services that a[re] outlined in the retainer agreement, which states in part:

"Retainer and Contingency Letter Agreement Johnson v. District of Columbia Gov't et al.

Dear Ken: This is to confirm our understanding with you with respect to our representation of you ('Client') in connection with the above-reference subject matter.

1. Nature of Services. The services to be rendered by our firm include, but are not limited to, advice on the strategy and litigation for the above-reference case, preparation of all necessary pleadings and case materials, prosecution of the case at trial and, if applicable, on appeal, and any other matters on which we may be asked to provide legal counsel from time to time....

2. Fees. Client agrees to pay attorney's fees for professional services as follows: 25% of any settlement or recovery prior to trial, 33% of any settlement, recovery, or judgment once the trial has commenced, and 40% if the case is appealed."

Jesse Gadson or Tony Lee and his law firm McGuireWoods LLP were supposed to sue for the recovery of Johnson's livelihood and his commercial real property where he earned his livelihood, which he lost as a direct result of the actions of the District of Columbia government and its police. They were also supposed to sue for the "many" violations of Johnson's civil rights, inter alia.

B. The issue of whether Johnson was *deny equal protection of law and equal benefit of law.*

The United States Court of Appeal's 10/9/2007 Judgment completely ignores the fact that Johnson filed a timely Rule 60(b) "Motion to Vacate Prior Judgment", which also asked for leave to amend the Amended Complaint pursuant to Rule 15(a) and (c) as well as the Supreme Court precedent in *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222. The United States Court of Appeals reviewed Johnson's 6/9/2006 Amended Complaint ***de novo***.

"Ordinarily, post judgment amendment of a complaint requires reopening of the judgment"—*Building Industry Ass'n of Superior California v. Norton*, 247 F.3d 1241. Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. Johnson's motions to vacate prior judgment and for leave to amend the Amended Complaint should have been granted. The Supreme Court precedent in ***Foman v. Davis***, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 establishes that "....district court abused its

discretion in denying motion to amend complaint to assert right of recovery.... after dismissal of complaint." See also *Harrison v. Rubin*, 174 F.3d 249, 252 (D.C. Cir. 1999). Johnson wants appointed counsel to explain to the Supreme Court the reason that would justify relief from the operation of the September 19 or 20, 2006 Judgment/Order pursuant to Rule 60(b).

The U.S. District Court should have 1) vacated its judgment; 2) allowed Johnson to conduct discovery of the defendants; and 3) allowed Johnson to amend the June 9th 2006 Amended Complaint. Discovery would have revealed that the Defendants offer their services to nonwhite customers, yet refused Kenneth Johnson. Johnson did not need to amend the Complaint to assert allegations that he was racially discriminated against, because those allegations were already present in the Amended Complaint. Johnson wanted to conduct discovery of the defendants, add additional allegations to the Amended Complaint, and change the "Compensatory and Punitive Damages" portion of the Amended Complaint at page 101 of the Amended Complaint.

Johnson's 60(b) Motion to Vacate Prior Judgment was not granted, and ignored on Appeal. It is equal clear that Johnson is being denied the protections of law and the benefits of law that are spelled out in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d

222 or TITLE 42 U.S.C. § 1981 or Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. or *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc)! Johnson did not fail to state a claim upon which relief may be granted, yet his Amended Complaint was nonetheless dismissed for failure to state a claim upon which relief may be granted, when Johnson did not fail to state a claim upon which relief may be granted.

In attacking a defendant's explanation, a plaintiff is entitled to offer three categories of evidence: (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the Defendant's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff; such as independent ***evidence of discriminatory statements or attitudes*** on the part of the Defendants. See *Aka v. Wash. Hosp. Ctr.*,, 156 F.3d at 1284, 1289(D.C. Cir. 1998) (en banc). The explanations that the Defendants gave to Kenneth W. Johnson w[ere] merely pretext to hide [t]he racial discrimination against Johnson, because Johnson is a White man of mixed racial ancestry.

CONCLUSION

For the reasons set forth herein, Johnson asks the Supreme Court of the United States to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and asks the Supreme Court to mandate that the "Record" in the United States Court of Appeals for the District of Columbia in the case of Johnson v. Gadson et al., 06-7171 and 06-7204 be certified and transferred to the Supreme Court of the United States for review.

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